Eminent Domain Reporter

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Supreme Court Addresses Interesting Issues Triggered by Taking

This recent Connecticut Supreme Court case *(City of Bristol v. Tilcon Minerals, Inc.)* provides a wealth of insights into a number of significant issues in eminent domain proceedings: highest and best use; "lot" and "modified lot" methods of valuation; partial taking; stigma; inverse condemnation; and trespass.

The City of Bristol condemned a 31 year easement on 25 acres of a 180 acre unimproved parcel to remediate and monitor groundwater contamination from the City's landfill. The property owner appealed the $50,000 proposed compensation and also claimed that an additional, adjoining 20 acres had been taken by inverse condemnation for which compensation should be paid.

Highest and Best Use: Residential

At the trial, the plaintiff's appraiser testified that the highest and best use of the 25 acres was for residential development. At the time of the taking, the property had a permit for sand and gravel mining, but the mining operations on the site had terminated prior to the taking. Plaintiff had prepared a "concept" plan for trial showing the feasibility of subdividing the property. However, while the property was zoned residential, the property owner had not sought subdivision approval, nor did it have present plans to develop the property. Nevertheless, the trial court determined that the highest and best use of the property was for a residential subdivision of single-family homes. The Supreme Court accepted the trial court's findings and remanded the case to the trial court on the issue of damages only because the trial court had not taken into account the costs of subdividing and holding the property.

Finding of Stigma

Another interesting aspect of this case is the Supreme Court's affirmance of the trial court's conclusion that stigma associated with the City's pollution and monitoring wells on the site would prevent the plaintiff from marketing or developing the property for single-family homes for 31 years. This had to be factored into the determination of damages.

No Inverse Condemnation

As to the inverse condemnation claim, the Supreme Court overturned the trial court's finding that the actions of the City resulted in a de facto taking of an additional 20 acres. The trial court did not find that the contamination of the groundwater and stigma totally destroyed the value of the lots or that residential development would be physically restricted, findings necessary for an inverse condemnation determination.

Contamination Resulted In Trespass

Finally, the Court agreed with the trial court that the contaminated water resulted in a "permanent" trespass. It was not necessary to prove that the City intended to contaminate plaintiff's land. Instead, the Court held that this element of intent is met if the City "intended the act that amounted to or produced the unlawful invasion and had good reason to know or expect that subterranean and other conditions would cause the contaminated substances to migrate" to the plaintiff's land. The "permanency" requirement for trespass was met because of the length of time (31 years) the trespass would continue. The Court remanded the case to the trial court on the issue of damages for the trespass as well.

City of Bristol v. Tilcon Minerals, Inc. and Tilcon, Inc. v. City of Bristol, 284 Conn. 55 (2007).

If you have any questions or comments, please contact Marge Wilder at 860-424-4303 or by email to mwilder@pullcom.com.

Goodwill Study Underway

A committee formed by Connecticut's Ombudsman for Property Rights is studying the potential effects of

expanding relocation assistance benefits to encompass the loss of goodwill by a business resulting from a governmental taking. The Goodwill Study Committee is chaired by the Ombudsman and consists of representatives from both the public and private sectors including real estate appraisers and business valuation experts.

In its first few meetings, the Committee appears to be taking a broad view of the issue as it examines what constitutes goodwill, how it can be valued and how its loss can be compensated for in a manner that is fair to both the business community and taking authorities. Committee members have indicated a specific desire to assist tenants that experience a loss of goodwill during the eminent domain process as they are sometimes shortchanged by existing law regarding just compensation and relocation assistance.

The Committee is scheduled to conduct at least one more meeting on November 28, 2007, in the Legislative Office Building before it finalizes its report to the General Assembly by the end of this year. That report will become the subject of legislative hearings as well as possible new legislation in 2008. As a result, all parties that are interested in this topic are encouraged to provide their input to the Committee as it develops what may be a set of groundbreaking legislative recommendations. Further details can be found at www.ct.gov/pro/site.

If you have any questions or comments, please contact Greg Servodidio at 860-424-4332 or by email to gservodidio@pullcom.com.

Taking Results from Denial of Inland-Wetlands Permit

A Superior Court case decided in March of this year demonstrates how a municipality may inadvertently take an owner's property as a result of decisions by its wetlands agency. The plaintiff appealed the denial by the East Lyme Conservation Commission to build a residential home on a lot containing wetlands, after having reduced the size of the proposed house several times subsequent to a number of denials of prior applications. The plaintiff claimed that the Commission's denial resulted in an unlawful taking, contrary to the Fifth Amendment to the U.S. Constitution and Article First of the Constitution of Connecticut.

In finding that the actions of the Commission amounted to a taking, the court determined, based on the facts of this case, that there was a final determination by the Commission and that further applications by the plaintiff would be fruitless. The court also found that the landowner reasonably could have expected at the time he purchased the property that he would be able to develop it based on the development on adjacent properties and the property owner's experience in developing other properties with wetlands. Finally, the court determined that there was a practical confiscation of the owner's property and that, applying the balancing test, the owner was damaged by the actions of the Commission more than the public was benefited.

Surprisingly, instead of ordering the town to pay fair compensation to the property owner for the inadvertent taking, the court remanded the case to the Commission with direction to approve the last, considerably reduced application with appropriate conditions to protect the wetlands.

Turgeon v. Town of East Lyme, Conservation Commission, et. al., 2007 Conn. Super. LEXIS 690 (March 9, 2007).

If you have any questions or comments, please contact Elliott Pollack at 860-424-4341 or by email to epollack@pullcom.com.

Property Valuation Topics

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The Law of Unintended Consequences

A review by Richard F. Dye and Daniel P. McMillen in the July 2007 issue of *Land Lines*, a publication of the Lincoln Institute of Land Policy, contains some fascinating findings about the results of municipal assessment limitation measures.

The authors conclude, based on an extensive study of assessment limits established in Minnesota, that "the primary effect of an assessment cap is to shift tax burdens from favored to unfavored groups…." The "policy surprise" determined by the authors is that there is also a shift in tax burden "from eligible properties with high appreciation rates to those that are appreciating at a lesser rate."

The authors' findings would appear to be applicable to the City of Hartford where assessment limitations have been in place for almost two decades. One to four family properties enjoying the benefit of these assessment limitations indeed have appreciated more rapidly than commercial properties, which were hit with a tax rate surcharge to absorb the benefit extended to residential properties.

If you have any questions or comments, please contact Gregory F. Servodidio at 860-424-4332 or by email gservodidio@pullcom.com.

Highest and Best Use is Not a Theoretical Issue

Gasoline service stations have long been thought to be a very high – if not the highest and best use of the corner parcels at the thousands of places across America where they may be found. But what was true yesterday may not be true tomorrow.

As the *New York Times* pointed out on July 4, 2007, gas stations are being sold for other uses lately in New York City. Buyers are converting them from dispensers of high octane, medium and regular fuel to condos or retail uses.

> "…the shortage of city development land coupled with [low demolition costs have] attracted developers [to these locations.]"

A broker who specializes in marketing these parcels notes that the shortage of city development land coupled with the fact that gas station site improvements typically are very modest, thereby minimizing demolition costs, has attracted developers.

A former BP Amoco Pumper on Atlantic Avenue in Brooklyn was probably worth no more than $2 million as a gas station. Attracting an alternate user, it was sold for $13 million for multi-family development and retail. A Sunoco station, also in Brooklyn, commanded a $3.2 million price for alternate development whereas, according to the selling broker, it was worth no more than $1.1 million if the current use was to be continued.

Environmental issues are typically addressed by sellers who, under the standard transaction these specialist brokers negotiate, retain responsibility for cleaning up the site and even obtaining DEP approval for the transfer.

Ironically, the loss of gas stations to alternate development is making existing stations rarer and probably more valuable.

Religious Tax Exemption Discussed

Since this issue of *Property Valuation Topics* addresses an important duo of exemption cases pertaining to open space, your editors thought that we might also include another exemption case, this one dealing with religious institutions.

Before Judge Trial Referee William L. Hadden, Jr., sitting in the New Haven Judicial District, were two parcels of real estate owned by a church. Should they be entitled to maintain their exemption after the New Haven assessor removed them on the Elm City's October 1, 2004, grand list?

Although he had granted an exemption to the properties located at 783 and 795 Grand Avenue because they were owned and used by a religious organization for religious purposes and as a residence by the church's officiating clergyman, the assessor conducted an inspection five years later. The inspection led him to the conclusion that, with the exception of one floor of the building at 783 Grand Avenue, no portion of either premises was then being used for religious purposes.

Rejecting the testimony of a bishop of the church that he had been at religious services on 40 or 50 occasions during 2004 at 783 Grand Avenue, the court dramatically concluded that his assertions were "not persuasive," referring particularly to the bishop's lapse of memory when pressed as to the dates he actually attended.

The court also had access to the transcript of proceedings in the U.S. Bankruptcy Court since the church had filed a Chapter 11 petition in bankruptcy in July 2004. Both the minister and his wife gave testimony during those proceedings which were contrary to the claims they made in the tax appeal discussed here.

The court sustained the assessor's decision to revoke the exemption for 783 Grand Avenue although it reinstituted the exemption for the second property on the strength of the minister's testimony that in addition to its residential use, the balance of the building was used for the receipt, storage and distribution of used furniture for needy families.

The lesson here is that in an era in which Connecticut municipalities are being pressed to increase property tax yields, owners of exempt property can be expected to justify their exemptions in questionable cases.

Superior Court, Judicial District Of New Haven At New Haven, Docket Number CV-054011440S

If you have any questions or comments, please contact Elliott B. Pollack at 860-424-4340 or by email epollack@pullcom.com or Laura A. Bellotti at 860-424-4309 or by email lbellotti@pullcom.com.

Open Space Classification Reviewed

A pair of rulings, both decided on March 30, 2007, add to our knowledge concerning the interaction of open space designations and property valuation for *ad valorem* tax purposes.

In litigation involving the exclusive Aspetuck Valley Country Club in the lovely Fairfield County town of Weston, the club sought to overturn the Weston assessor's refusal to classify most of its property as open space, a result which would have likely produced a substantial tax reduction for the Club. Aspetuck Valley's argument was that its properties have been identified for over 30 years on town development plans as, variously, a "major existing conservation and recreation area," "an area of private recreation," and an area of "conservation and recreation." The town's position was that planning designations are not controlling and that Connecticut law requires the local legislative body

to approve any open space designation before the assessor may be required to so classify property.

Reviewing competing motions for summary judgment, Superior Court Judge Richard P. Gilardi ruled that an open space plan must indeed obtain a town's formal approval; the fact that older planning documents had shown most of the Club's real estate as open space was of no moment.

In the second case, the issue was *declassification*. A developer purchased the real estate owned by a private airport operator in the shoreline town of Madison intending to redevelop it for active adult housing. At the time of purchase, the property was legally classified as open space, the binding nature of the designation not being an issue here, and it was so listed by the Assessor.

After necessary zoning approvals were obtained to ground the planes and to recycle the little airport into an adult housing community, the Madison assessor terminated the open space designation on October 1, 2004, thus increasing the property's market value for assessment purposes from $345,900 to $3,175,000.

The developer asserted that the assessor acted improperly in reclassifying the property, because, as of the October 1, 2004, assessment date, the property's "use" had not changed and, in fact, it continued to be used as an airport through 2006.

Sustaining the developer's position, Superior Court Judge Trial Referee Arnold W. Aronson ruled that zoning changes and other land use *approvals* did not trump the open space designation and that as of October 1, 2004, the developer had done nothing to change the *use* of the property.

With actual use being the benchmark, Judge Aronson held that the assessor's termination of the little airport's designation was improper.

Valuation *in use* of vacant or underdeveloped land, as opposed to valuation based on highest and best use *in exchange*, the proper legal benchmark for determining market value, frequently produces a lower value, and therefore lower taxes, for *ad valorem* purposes. It is not surprising that the country club and the little airport objected strenuously to obtain/maintain their "in use" valuations. Certainly, classification as single family home property, the likely benchmark of Aspetuck's land, would increase the tax burden on members substantially. Were the airport to be valued for the purposes intended by the senior housing developer, the same outcome could be expected.

Our courts frequently remind us that exemptions and other tax breaks are construed strictly against the property owner. Here, two real estate tax appeal plaintiffs learned that again. One, however, did not have to pay for the lesson.

Aspetuck Valley Country Club, Inc. vs. Town of Weston, Docket Number C-06-4014805 (March 30, 2007) and Griswold Airport, Inc. vs. Town of Madison, Docket Number CV-054-011562 (March 30, 2007).

If you have any questions or comments, please contact Marjorie S. Wilder at 860-424-4303 or by email mwilder@pullcom.com.

ATTORNEY NOTES

Pullman & Comley's Property Valuation Department was proud to have Peter R. Korpacz anchor our annual Property Valuation Symposium on October 4. Mr. Korpacz originated the *Korpacz Report* and is Executive Managing Director for Weiser Realty Advisors, LLC. He was formerly Director of Global Real Estate Research for Pricewaterhouse Coopers. He spoke on the "U.S. Real Estate Economy, Fall 2007". Mr. Korpacz also offered his unique insights about capital markets and current capitalization rate trends including a forecast. Important 2007 legal property valuation developments were discussed by members of the Property Valuation Department.

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